



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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JAN 10 2001

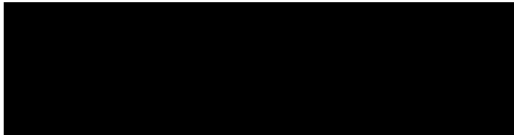
File: WAC-99-241-52484 Office: California Service Center Date:

IN RE: Applicant:



Application: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF APPLICANT:



Public Copy

Identifying information
prevent clearly documented
violation of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5). The director determined that the petitioner failed to establish that she had invested the requisite capital in a new business and that the money invested was obtained by lawful means.

On appeal, the petitioner argues that she has invested more than \$500,000 and that these funds derive from a lawful source, her overseas interests.

The petitioner indicates that the petition is based on an investment in a new commercial enterprise in a targeted employment area for which the required amount of capital invested has been adjusted downward to \$500,000.

INVESTMENT IN A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5) of the Immigration and Nationality Act, states in pertinent part:

(A) In general. - Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise-

(i) which the alien has established,

(ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

Title 8 Code of Federal Regulations Section 204.6(h) states, in pertinent part:

The establishment of a new commercial enterprise may consist of:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees.

In support of her petition, the petitioner submitted articles of incorporation for Zhen Da, Corp. and a stock certificate documenting her ownership of 500,000 shares of stock in that corporation. The petitioner has not established that she has invested the necessary capital into this enterprise.

8 C.F.R. 204.6(e) states, in pertinent part, that:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. ...

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

- (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to

invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The director noted that the funds transferred into the corporate account did not originate from the petitioner. The wire transfer notices reveal that the \$99,985 deposited into [REDACTED] account on April 24, 1998, originated from [REDACTED], Limited; the \$199,985 deposited on December 30, 1998, originated from [REDACTED] Limited; and the \$200,000 deposited on February 23, 1999 originated from [REDACTED]. In support of the petition, the petitioner submitted two product purchase agreements documenting the sale of merchandise by [REDACTED] (also identified on the agreements as [REDACTED] of [REDACTED]) to [REDACTED], Ltd. and [REDACTED] Ltd.

On appeal, the petitioner submits three unsigned Chinese language documents with translations. The first document, dated December 15, 1994, purports to certify that the petitioner owns 100% of the shares in [REDACTED] Ltd. The remaining two documents purport to be [REDACTED] Enterprise Board Resolutions dated March 18, 1998 and November 6, 1998, attesting to "purchase/sales" contracts with [REDACTED] Company and [REDACTED] Company, and authorizing those companies to exchange part of the contract amount for U.S. dollars and transfer that amount into the account of [REDACTED] Corp. The petitioner also submits a December 15, 1994, signed Investment Agreement between herself and [REDACTED] forming a joint venture [REDACTED] Development Company. Finally, the petitioner submits a March 2, 1999, Approval for Capital Withdrawal signed by [REDACTED] authorizing the petitioner to withdraw \$200,000 of her investment and confirming the transfer of the money to [REDACTED] account.

The record contains a sales receipt documenting a sale by [REDACTED] to [REDACTED] Ltd. However, the two authorizations to transfer funds directly to the petitioner are issued to other companies. As such, the petitioner has not demonstrated that [REDACTED] transferred the funds to [REDACTED] pursuant to any type of agreement with the petitioner.

Moreover, as a corporation is a separate legal entity from its shareholders, the petitioner has not established that funds diverted from the sale of the corporation's inventory in the course of the corporation's business are properly her personal funds prior to receipt and distribution by the corporation. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). In addition, in support of the petition, the petitioner submitted a Registration Certificate of Tax and a Legal Person of Enterprise Business License for [REDACTED] Corporation of [REDACTED] City. Both documents indicate that the economic character of the corporation is a "collective ownership." Such a description raises further concerns regarding whether the funds transferred pursuant to the corporation's agreements were truly the petitioner's funds.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). As stated above, the products purchase agreements name the distributor as [REDACTED] Corporation of [REDACTED] and, further down on the documents, as [REDACTED]. The record does not resolve whether these two names refer to the same company. As such, the petitioner has not resolved the discrepancy between the unsigned document indicating she is the sole shareholder of

██████████ and the official tax documents defining ██████████ Corporation of ██████████ as a "collective ownership" enterprise.

Further, the petitioner has also failed to provide any financial documentation for ██████████ Real Estate Development Company which would establish that her interest in the company at the time of the money transfer was worth at least \$200,000. Without any corroboration of the Approval for Capital Withdrawal, the petitioner has not established that the funds originating from ██████████ were, in fact, her own personal funds. Moreover, the third wire transfer indicates the funds were transferred by ██████████ and ██████████. The petitioner has not demonstrated that ██████████ and ██████████ are one and the same.

Even if the petitioner established that the funds wired to the corporate account were her funds, the record indicates that the petitioner is the sole shareholder of ██████████, Corp. Therefore, even if the petitioner did contribute \$500,000 into the corporate account, that money is not properly at risk.

The regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment.

Matter of Ho, I.D. 3362, 5 (Assoc. Comm., Examinations, July 31, 1998). As in that case, the petitioner has not explained how the \$500,000 was used or is to be used. The bank statements reveal that between April 30, 1998 and December 1, 1998, \$123,795.88 (\$50,000 of which was originally deposited pursuant to a "credit memo") disappeared from the corporate account. The corporate tax return for the period March 16, 1998, to March 31, 1999, lists the following expenses: \$1250 for rent, \$800 for taxes and licenses, \$700 in advertising costs, and \$6519 for bank charges, legal and professional expenses, office expenses, and tour guide fees. These expenses are far short of the \$123,795.88 which disappeared from the account between April and December of 1998. The record does not show any additional business expenses for that period. As such, the petitioner has not demonstrated that her funds were either used for business purposes or committed to future use by the corporation.

The tax returns also reveal a shareholder loan for \$150,000. The regulations specifically prohibit the use of loans to the corporation as part of the investment. 8 C.F.R. 204.6(e). As discussed above, the petitioner claims to be the sole shareholder.

The petitioner has not demonstrated that this loan was in addition to the \$500,000 allegedly contributed.

Counsel asserts on appeal that the petitioner purchased two Lincoln Town Cars, a Van Hool bus, a coach bus, and office equipment (including a computer.) Counsel also references other expenses of the business such as advertising, auto expenses, bus rental, business promotion, insurance, lease payments, licenses and permits, rent and parking lot rental. The sale agreements for the [REDACTED] and the [REDACTED] reveal that both vehicles were financed. The contract for the [REDACTED] specifically states that the bus is the collateral for the loan and the petitioner has not demonstrated that her personal assets secure the loan used to purchase the [REDACTED]. The Lincoln Town cars were leased.

While the documentation submitted on appeal reveals that the business purchased assets in preparation of beginning operation, the documents do not demonstrate that any of the petitioner's funds were used. The corporation itself purchased the buses, leased the cars, and leased the premises. The petitioner has not provided the receipts from the furniture and office equipment purchases. As the bank statements show a \$50,000 deposit from a "credit memo" on April 1, 1998 and a \$70,000 deposit from a "commercial loan credit" on December 15, 1998, all of the funds in the corporate account were not contributed by the petitioner. As such, the petitioner has not demonstrated that the documented start-up costs were financed by her personal funds, and not by these loans.

SOURCE OF FUNDS

Title 8, Code of Federal Regulations, Section 204.6(j) states:

A petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing *lawfully obtained capital* in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees. (Emphasis added.)

Furthermore, Title 8, Code of Federal Regulations, Section 204.6(j)(3) states:

To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

- (i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years. (Emphasis added.)

As discussed above, the record is not clear regarding the ownership of [REDACTED] Corp. Even if solely owned by the petitioner, [REDACTED] Corp. is still a separate legal entity. The petitioner has not established that corporate law in China permits the proceeds of a sale to be lawfully paid to a shareholder instead of to the corporation itself for distribution in accordance with the articles of incorporation.

In a letter accompanying the petition, counsel stated that the reason a third party transferred the funds is "because China is [sic] foreign exchange control country. In China, any individual or business entity has a limitation to wire transfer money abroad." In effect, counsel states that the transfer was made by a third party in an effort to circumvent the foreign exchange controls of China. Counsel's statement raises questions regarding the source of the petitioner's funds, the legitimacy of the Board Resolutions which authorized the wired funds, and the potentially unlawful transfer of the funds from the petitioner's home country.

Finally, as evidence that her funds were obtained lawfully, the petitioner submits on appeal personal Chinese tax returns from 1994 through 1998 and balance sheets for [REDACTED] Corp. However, the petitioner has not submitted any of her tax returns from prior to the organization of [REDACTED] or [REDACTED] Real Estate Development. Nor has the petitioner submitted other evidence of income which could explain the source of the capital used to finance the formation of [REDACTED] or invest in [REDACTED] Real Estate Development. Therefore, the petitioner has failed to establish the lawful source of the \$500,000 transferred to the United States.

EMPLOYMENT CREATION

Title 8 Code of Federal Regulations section 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature or projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

In addition, Title 8 Code of Federal Regulations section 204.6(e) states, in pertinent part:

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. . . . This definition shall not include independent contractors.

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, of any nonimmigrant alien.

In support of the petition, the petitioner submitted a statement from ADP EasyPay for the period June 1, 1999, through June 30, 1999, indicating [REDACTED] hired four employees on June 1, 1999. The petitioner also submitted the I-9s completed by these employees. As the EasyPay statement does not list how many hours these employees worked during that period, the statement cannot

demonstrate whether any of these employees work full-time. The record does not reflect that [REDACTED] Corp. has already hired 10 full-time employees.

Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

Comprehensive business plans as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra, at 9. Elaborating on the contents of an acceptable business plan, Matter of Ho states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

The business plan submitted by the petitioner indicates the business has already hired four employees and proposes hiring an additional six employees by October 2000. However, the plan does not contain sufficient detail regarding the business and its job-creation potential to be considered a comprehensive business plan. Specifically, the business plan does not analyze other similar companies in the area. Nor does the plan adequately explain why the business will require the services of each proposed employee

and what their duties will be. Mere conclusory assertions do not enable the Service to determine whether the job-creation projections are any more reliable than hopeful speculation. Id.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the petition will be denied.

ORDER: The appeal is dismissed.